February 19, 1999

In the Matter of:	
William Ferriolo	
Claimant	
against	Case No.: 1998-LHC-2166
	OWCP No.: 1-127570
New Haven Terminal Corporation	
Employer	
and	
American International Group	
Liberty Mutual Insurance Co.	
Carriers	
and	
Director, Office of Workers' Compensation Programs, United States Department of Labor	
Party-in-Interest	

Appearances:

David A. Kelly, Esq.
For the Claimant

Lucas D. Strunk, Esq.
For the Employer/American International Group

Kristie L. Di Resta, Esq.
For the Employer/Liberty Mutual Insurance Co.

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the the Longshore and Harbor Workers' Compensation Act as amended (33

U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on June 24, 1998 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, RX for an exhibit offered by Respondent AIG and EX for an exhibit offered by Respondent Liberty Mutual. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
RX 9	Notice relating to the taking of the deposition of James Donaldson, M.D., on August 5, 1998.	07/01/98
RX 10	Notice relating to the taking of the deposition of Michael Vasaturo on July 28, 1998.	07/07/98
RX 11	Attorney Strunk's letter relating to the deposition of Mr. Vasaturo.	07/10/98
RX 12	Notice relating to the taking of the deposition of James D. Schine.	07/29/98
RX 13	Notice relating to the taking of the deposition of Michael A. Luchini, M.D.	08/05/98
RX 14	November 9, 1998 letter from Attorney Strunk filing	11/12/98
RX 15	Dr. Luchini's October 22, 1998 report.	11/12/98
RX 16	July 28, 1998 deposition of James D. Schine.	11/12/98
ALJ EX 27	This Court's January 7, 1999 Order.	01/07/99

CX KK	January 22, 1999 letter from Attorney Strunk filing the	01/27/99
CX LL	August 7, 1998 report of Dr. Luchini.	01/27/99

The record was closed on January 27, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate (TR 10-11), and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On May 12, 1993 Claimant suffered a knee injury in the course and scope of his employment.

4. The parties complied with all notice, claim and controversion provisions.

5. The parties attended an informal conference on March 18, 1997.

6. The applicable average weekly wage for the 1993 injury is $817.24. The applicable average weekly wage for the 1996 injury is $716.89.

The unresolved issues in this proceeding are:

1. Causation of Claimant’s hip condition.

2. The nature and extent of Claimant’s disability.

3. Loss of wage earning capacity from March 20, 1996 through the present.

4. Medical bills of Dr. Luchini relating to Claimant’s hip condition.

5. The Applicability of Section 8(f) of the Act.

PROCEDURAL HISTORY

Claimant, in addition to his claim based on his May 12, 1993 injury, also filed a claim for an April 30, 1996 injury. However, the parties informed this Administrative Law Judge at the formal hearing that Claimant and Respondent AIG[1] had reached agreement for a voluntary payment of compensation and voluntary acceptance of some medical bills with regards to the April 30, 1996 injury.[2] The parties requested that the claim relating to the April 30, 1996 injury be remanded. An Order of Remand was issued on July 6, 1998.

Preliminary Evidentiary Issue

This Administrative Law Judge, at the formal hearing on June 24, 1998, reserved ruling on the admissibility of CX T and U, which were wage comparisons prepared by Claimant's counsel. (TR 110) Claimant's counsel explained that he used wage statements obtained from Employer to prepare the exhibits. (TR 109) Counsel for Respondent AIG indicated he planned to depose Mr. Vasaturo, an employee of New Haven Terminal, and that this would solve any questions relative to the accuracy of the charts that Claimant's counsel generated. (TR 108) The deposition of Mr. Vasaturo has not been submitted to this Court, although the deposition of James D. Schine, another employee of New Haven Terminal, was submitted. (RX 16) As counsel has offered no basis for excluding the wage comparisons prepared by Claimant's counsel, Claimant's exhibits T and U are hereby admitted into evidence, as such wage information is relevant and material to the unresolved issues presented in this case, and the objections actually go to the weight to be accorded those exhibits.

SUMMARY OF THE EVIDENCE

William F. Ferriolo ("Claimant" herein), forty-nine (49) years of age, who has a tenth grade education and has taken some courses in business and general education at South Central Community College, went to work at New Haven Terminal Corporation ("Employer") in April of 1967 at the age of seventeen. Employer's

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[1]Respondent Liberty Mutual served as Employer's liability carrier under the Longshore Act from 1991 until September 1, 1995. Respondent AIG served as Employers liability carrier from September 1, 1995, until July 12, 1996. (TR 5-6)

[2]Respondent AIG submitted evidence relating to the April 30, 1996 injury. (RX 1-8) Claimant also submitted evidence relating to the April 30, 1996 injury. (CX A-Q, S-W, Z, AA-JJ)

facility in New Haven[3] is adjacent to the navigable waters of the Long Island Sound and the Atlantic Ocean where ocean-going vessels come into the port where the cargo is either unloaded or loaded for export. When Claimant was eighteen years old, he was drafted by the United States Army, and he served in Viet Nam and Germany. After serving for two years, Claimant returned to work with Employer. Claimant started with Employer as a general laborer, a job that required him to load and unload cargo. Claimant advanced to operating machines such as forklifts, cranes, derricks, pay loaders and "just about everything." Presently, Claimant is a third gang signal man. This position requires Claimant to tell the crane operator where to land the loads and where to pick them up, and to basically be the "eyes for a crane." (TR 28-33)

On May 12, 1993, Claimant was working on the dock at Employer's New Haven terminal.[4] Claimant was kicking off the chains that wrap around steel plates when he injured his right knee. (TR 43-44) On May 16, 1993, Claimant made an emergency visit to St. Raphael's Hospital complaining of right knee pain. He was diagnosed with acute degenerative arthritis of the right knee and he was discharged. (EX 1)

Claimant was examined by Michael A. Luchini, M.D., a board certified orthopedic surgeon, on May 19, 1993. (EX 2; CX X) Dr. Luchini reviewed Claimant's past medical history and performed a physical examination. His impression was of:

1. Right hip and knee sprain.
2. Pre-existing mild degenerative joint disease, right hip.
3. Pre-existing chronic sprain, right knee; pre-existing 5% (five-percent) permanent impairment of the right knee.

Dr. Luchini stated that Claimant's "condition now was made materially and substantially greater because of the pre-existing condition to his right knee as well as the right hip." (EX 2; CX X)

Dr. Luchini examined Claimant again on March 20, 1996. (EX 3; CX X) Dr. Luchini, after reviewing Claimant's past medical history

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[3]Claimant testified that if there was no work in New Haven, he would go to the Employer's facility in Bridgeport to work. As Claimant does not have seniority at the Bridgeport facility, when he works there, his job is usually driving. (TR 35-36)

[4]Claimant testified that, at the time of the accident, his job usually was not that of a laborer. Claimant would usually operate a machine, but depending on the seniority of the other employees who came in, he could be required to work as a laborer. (TR 44)

and performing a physical examination, found that Claimant "has degenerative arthritis of the right hip, which was made symptomatic by an injury of 7-12-88 and was aggravated by a repeat injury on May 12, 1993." He also found that Claimant's hip continues to be aggravated by heavy work. Claimant was given a refill of Motrin 800 mg., and he was advised to lose some weight. Dr. Luchini indicated that in about ten to twenty years Claimant's symptoms will become severe enough that he will require a total hip replacement.

Claimant saw Dr. Luchini for a follow-up on September 23, 1996. (CX X) Dr. Luchini stated that Claimant "has approximately a 10% (ten percent) permanent partial impairment to the right hip." He also stated that, "[b]y history, the hip was made symptomatic by an injury on 7-12-88."

Dr. Luchini was deposed on May 18, 1998. (JX 1) He stated that he has been treating Claimant on and off since 1988. (**Id**. at 5) Claimant was seen on March 20, 1996 with complaints of right lower-extremity pain radiating from the groin into the knee. (Id at 6) Dr. Luchini felt Claimant's problem was related to some degenerative arthritis in his right hip and aggravated by injuries on July 12, 1988 and May 12, 1993. (**Id**. at 7) Claimant was seen again on September 23, 1996 for continued right groin pain. (**Id**. at 7-8) Dr. Luchini found Claimant had degenerative arthritis in the right hip, and that it was made symptomatic originally by the injury of July 12, 1988 and then the subsequent injury of May 12, 1993. (**Id**. at 8) He also found that Claimant has a 10 percent permanent partial impairment to the right hip. (**Id**. at 8-9, 38)

On January 25, 1993, Dr. Luchini determined that Claimant has a 10 percent permanent partial impairment to the lumbar spine as a result of an October 10, 1990 accident.[5] (**Id**. at 9, 37) Claimant had been complaining of pain in the lumbar spine with some radiation of pain in the right posterior thigh and buttock, and Dr. Luchini felt that he had degenerative disk disease of the lumbar spine as well as some degenerative facet disease. (**Id**. at 10)

On October 2, 1989, Dr. Luchini determined that Claimant suffered a 5 percent permanent partial impairment to the right knee as a result of a July 12, 1988 injury.[6] (**Id**. at 11, 37) Claimant

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[5]Claimant was working in the hold of a ship when a four by four got caught in between a chain and a steel plate, shot out, and struck Claimant in the lower back. Claimant sought treatment with Dr. Luchini and he missed about nine months of work. (TR 40-42)

[6]Claimant was working in the hold of a ship loading cargo. He had to get up on the cargo to get down to the hold, and he got his

had complained of pain and paresthesias about the right knee, and Dr. Luchini felt that he had a sprain-type injury which had not been relieved by conservative treatment. (**Id**.) Dr. Luchini noted that Claimant had a flare-up of the pain on May 12, 1993 when he kicked some chains. (**Id**. at 12) Dr. Luchini stated that it was his understanding that Claimant stopped doing physical labor type work at some point as a result of the injuries previously discussed. (**Id**. at 13) Dr. Luchini opined that Claimant's degenerative arthritis of the hip preexisted the May 12, 1993 injury, but he could not say that it preexisted the 1988 injury. (**Id**. at 42) He explained that once the hip disease starts, it progresses at a certain rate. (**Id**. at 43) He further explained that weight bearing and heavy work probably makes it worse, but that it is going to probably progress to some degree anyway. (**Id**.) Dr. Luchini stated that it was his feeling that the July 12, 1988 injury set off the degeneration in the hip joint that became manifest in 1993. (**Id**. at 45) He explained that Claimant's right hip condition was made symptomatic by the May 12, 1993 injury, and that it probably started from July 12, 1988. (**Id**.)

In a report dated August 7, 1998, Dr. Luchini stated as follows (CX LL):

We discussed Mr. Ferriolo's case in particular with regards to his right hip. The cause of the degenerative arthritis in the right hip is related to the 1988 and 1993 injuries at New Haven Terminal. I do not believe that his particular work from September of 1995 until May 1, 1996 has altered the natural progression of the disease.

Attorney Strunk has reviewed Mr. Ferriolo's work as a "laborer" during this time where he has worked a total of 12 days. In particular, I do not think that normal clutch driving, bending and even some ladder climbing or walking would lead to an acceleration of his arthritic condition. In fact, I do not believe his 10% permanent partial impairment to the right hip has changed from that of 1993 through 1998.

James D. Schine was deposed on July 28, 1998. (RX 16) Mr. Schine is currently employed by Logistec of Connecticut as director of marketing and sales. (**Id**. at 5-6) His previous position was as director of operations. (**Id**.) Mr. Schine explained that given

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foot tangled in some wire and he was suspended in the air for up to five minutes. Claimant felt "terrible" and his knee swelled up. He sought treatment with Dr. Luchini and he missed four to six months of work. (TR 38-40)

Claimant's seniority, if he was laboring, he would likely be placed in the back pilot laborer's position. (**Id**. at 15) Mr. Schine reviewed time sheets and noted the times that appeared to be attributable to when Claimant was performing as a laborer. (**Id**. at 15-21) He explained that some loads, such as steel coils, would be easier for the dock laborers than others. (**Id**. at 22) Mr. Schine identified the nature of the cargo that was being unloaded on the dates that he identified Claimant as working as a laborer. (**Id**. at 23-27)

As previously noted, Claimant suffered a back injury on October 10, 1990, when, while working in the hold of a ship, he was struck in the lower back by a four by four. Dr. Luchini referred Claimant to Joseph Chiang, M.D., and in a report dated July 19, 1991, Dr. Chiang stated as follows (CX R):

Impression: forty-one year old white man with back injury nine months ago. The X-ray study and the physical exam show no sign of radiculopathy but his history shows a possible radiculopathy. A likely idiology (sic) of his back and leg pain is myofacial pain. A plan: first, the patient will be started on Advil 25 mg g.h.s. to help him sleep. Second, since this patient hasn't been taking Motrin recently I have started him on Trilisate 750 mg p.o. bid. Third, since the patient has a partial myofacial pain I performed three trigger point injections of the right buttock area which he said relieved some of his pain after fifteen minutes. Fourth, we will see the patient in follow-up in one week and evaluate the medication and also the possibility of a series of trigger point injections. Fifth, we briefly discussed the possibility of epidural steroid injection but at this point we will hold on that and give more of an evasive treatment.

On August 9, 1991, Dr. Chiang stated as follows (CX R):

Mr. Ferriolo has been treated by us for his low back pain since July 19, 1991. We have been trying conservative treatment such as Elavil and Trilisate which he can give him temporary relief. We discussed the advantages and disadvantages of lumbar epidural steroid injections the patient agreed to have the procedure. The patient reported to Hospital Saint Raphael's minor op room today and received his first of series of three lumbar epidural steroid injections. The patient tolerated the procedure well and was discharged in stable condition.

Alan H. Goodman, M.D., saw Claimant on March 22, 1993 for an orthopedic evaluation in relation to his October 10, 1990 injury. (CX Y) Dr. Goodman, after taking the usual social, medical and

working histories, and performing a physical examination, stated as follows:

DIAGNOSIS: 1) Degenerative arthritis of the lumbar spine; 2) degenerative arthritis of the right hip.

Insofar as the patient's lumbar spine is concerned he has reached a point of maximum medical improvement following his injury of 10/10/90. He no longer requires active treatment. Supportive treatment in the form of regular exercise, as the patient is now doing, is appropriate. According to the AMA Guides to the Evaluation of Permanent Impairment, third edition revised, page 80, table 53, this patient is suffering from a permanent partil (sic) impairment of the whole person of 7%. The AMA Guides do not rate specifically for the lumbar spine. An article published in the Journal of the American Medical Association on 2/15/58 includes a table for the conversion of a whole man impairment to spine impairment. According to this table an impairment of the whole man of 7% is equivalent to a permanent impairment of function of the lumbar spine of 11%. In view of the progression of degenerative changes noted in the MRI studies taken in an approximate two year interval during the post-accident interval in this patient's case, it is reasonably probable that this impairment of function is a direct result of the accident in which the patient was involved on 10/10/90.

The patient is also suffering from degenerative arthritis of the right hip. This does not require any active treatment but potentially this may require surgical intervention. This condition is not in any way related to the accident in which the patient was involved on 10/10/90. It probably explains that component of the patient's complaints which referred to burning in the right knee and right groin.

At the present time, Claimant states that his hip and back bother him all the time, and that he is always in pain. (TR 104)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers**

Association, Inc., 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions

existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his knee and hip injuries, resulted from working conditions at the Employer's maritime facility. The parties have already stipulated that the Claimant suffered injuries to his knee on May 12, 1993. Claimant has established a **prima facie** claim that the harm to his knee is a work-related injury. However, Claimant also alleges that he suffered a hip injury on the day he injured his knee.

Respondent Liberty Mutual contends that Claimant did not establish a **prima facie** claim and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a) presumption.

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer, **i.e.**, substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied**, 507 U.S. 909, 113 S.Ct. 1264 (1993); **Obert v. John T.**

Clark and Son of Maryland, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). This requires that the employer offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in the case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988)(medical expert opinion which entirely attributed the employees' condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988)(medical testimony that claimant's pulmonary problems were consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part, only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989)(holding that causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment and the remaining 1%, which was removed shortly after his employment began, was in an area far removed from the claimant). The testimony of a physician, if credited by the administrative law judge, that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp**., 16 BRBS 128 (1984). If the judge finds that the presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. **See Devine v. Atlantic Container Lines, G.I.E.**, 23 BRBS 270 (1990).

In this case, Respondent Liberty Mutual has produced substantial evidence to dispel the Section 20(a) presumption. Dr. Luchini first saw Claimant in relation to the May 12, 1993 incident on May 19, 1993. (EX 2) At that time, Dr. Luchini's impression was as follows:

1. Right hip and knee sprain.
2. Pre-existing mild degenerative joint disease, right hip.
3. Pre-existing chronic sprain, right knee, pre-existing 5% (five percent) permanent impairment of the right knee.

(EX 3) Dr. Luchini stated that Claimant's condition "now was made materially and substantially greater because of the pre-existing condition to his right knee as well as the right hip."

Dr. Luchini examined Claimant again on March 20, 1996, at which time he stated that "Claimant has degenerative arthritis of the right hip, which was made symptomatic by an injury of 7-12-88 and was aggravated by a repeat injury on 5-12-93." (EX 3) He also stated that "the hip continues to be aggravated by heavy work." Dr. Luchini noted that Claimant reported that he had to do the physical work of a longshoreman, but that sometimes he just does machine work, and the pain is less severe.

Dr. Luchini's reports support the conclusion that Claimant sustained a work-related hip injury on May 12, 1993, and that his work activities as of March 20, 1996 continued to aggravate the hip condition. However, as Employer's liability carrier switched from Liberty Mutual to AIG on September 1, 1995, Dr. Luchini's opinions would indicate that Respondent AIG, not Respondent Liberty Mutual, is the responsible carrier. As Dr. Luchini opined that Claimant's work activities as of March 20, 1996 continued to aggravate his hip condition, the carrier at the time of the aggravation, Respondent AIG, would be liable for the entire disability resulting therefrom. **See Foundation Constructors, Inc. v. Director, OWCP**, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991); **Kelaita v. Director, OWCP**, 799 F.2d 1308 (9th Cir. 1986); **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990).

If rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Services Corp**., 29 BRBS 18 (1995); **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990); **Del Vecchio v. Bowers**, 296 U.S. 280 (1935). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra; MacDonald v. Trailer Marine Transport Corp**., 18 BRBS 259 (1986). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act. Where the evidence was in equipose, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied**, 395 U.S. 920, 89 S.Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994). Accordingly, after Greenwich Collieries, the employee bears the burden of proving causation by a preponderance of the evidence

after the presumption is rebutted. This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2nd Cir. 1997).

Based upon the foregoing, I find and conclude that Respondent Liberty Mutual has introduced substantial evidence to rebut the Section 20(a) presumption. Accordingly, this Administrative Law Judge must weigh all of the evidence and resolve the causation issue based on the record as a whole.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549

(1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In allocating liability among successive employers and carriers in the case of multiple or cumulative traumatic injuries, if the disability resulted from the natural progression of the initial injury and would have occurred notwithstanding the subsequent injury, then employer at the time of the initial injury is liable for the entire resultant disability. If, however, claimant sustains an aggravation of the initial injury, the employer at the time of the aggravation is liable for the entire disability resulting therefrom. **Foundation Constructors, Inc. v. Director, OWCP**, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991); **Kelaita v. Director, OWCP**, 799 F.2d 1308 (9th Cir. 1986); **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990).

Dr. Luchini and Dr. Kneville of St. Raphael's Hospital are the only physicians to examine Claimant with respect to his May 12, 1993 work-related incident. Dr. Kneville made no findings with respect to Claimant sustaining a hip injury on that date. Dr. Luchini opined that Claimant had degenerative arthritis in his right hip which was aggravated by injuries on July 12, 1988 and May 12, 1993, and that Claimant's work activity from September of 1995 until May 1, 1996 has not altered the natural progression of the disease. I find the opinions of Dr. Luchini to be most persuasive, and therefore, I find that Claimant's work activities on May 12, 1993 resulted in injuries to his right hip and knee.

On May 16, 1993, Claimant made an emergency room visit to St. Raphael's Hospital, complaining of right knee pain. (EX 1) An x-ray of Claimant's right knee was performed, and no fractures were identified, and there was no evidence of an effusion. The final diagnosis was of acute degenerative arthritis of the right knee. There was no mention of any injury to Claimant's right hip.

Dr. Luchini examined Claimant on March 19, 1993, and he diagnosed, **inter alia**, "right hip and knee sprain" and "pre-existing mild degenerative joint disease, right hip." He stated that Claimant's "condition now was made materially and substantially greater because of the pre-existing condition to his right knee as well as the right hip." (EX 2; CX X) Dr. Luchini examined Claimant again on March 20, 1996, and he stated as follows (EX 3; CX X):

> I reviewed the history of his injury, which dates back to 7-12-88 when he twisted his right knee while at work.

> What I thought was a knee injury was actually right hip pain. Most likely he was experiencing early degenerative arthritis, which was made symptomatic by the twisting injury. Subsequently, the knee was reinjured by the 5-12-93 episode. He has also continued to do heavy physical work, which aggravates this condition.

Dr. Luchini reiterated his findings in his May 18, 1998 deposition testimony. (JX 1) He added that once the hip disease starts, it progresses at a certain rate. (**Id**. at 43) He explained that weight bearing and heavy work probably makes it worse, but that it is going to probably progress to some degree anyway. (**Id**.) However, Dr. Luchini altered his opinion slightly in his report dated August 7, 1998. (CX LL) He again stated that the cause of the degenerative arthritis in Claimant's right hip is related to the 1988 and 1993 injuries. However, he also stated that he did not believe that Claimant's particular work from September of 1995 until May 1, 1996 has altered the natural progression of the disease. Dr. Luchini stated as follows (CX LL):

> Attorney Strunk has reviewed Mr. Ferriolo's work as a "laborer" during this time where he has worked a total of 12 days. In particular, I do not think that normal clutch driving, bending and even some ladder climbing or walking would lead to an acceleration of his arthritic condition. In fact, I do not believe his 10% permanent partial impairment to the right hip has changed from that of 1993 through 1998.

I find Dr. Luchini's opinions to be highly credible, probative and persuasive. He had been treating Claimant on and off since 1988. (JX 1 at 5) Dr. Luchini thoroughly explained in his reports and deposition testimony that Claimant's degenerative arthritis in the right hip was made symptomatic originally by the July 12, 1988 injury and then the subsequent injury on May 12, 1993. Although Dr. Luchini originally opined that Claimant's hip continued to be aggravated by heavy work, I find that he adequately explained his change of opinion. Dr. Luchini noted that Claimant worked as a laborer for only twelve days during the period from September of 1995 until May 1, 1996. He did not believe that Claimant's work during this period altered the natural progression of Claimant's disease. He also did not believe that Claimant's 10% permanent partial impairment to the right hip has changed form that of 1993 through 1994.

Dr. Luchini's opinion with regards to causation is supported by the testimony of Mr. Schine. (RX 16) Mr. Schine reviewed time sheets covering a period from July of 1995 through May of 1996.

(**Id**. at 15-22) He identified fifteen occasions where Claimant performed work as a laborer, as opposed to either a signalman or an operator. (**Id**.)[7] Dr. Luchini's opinion with regards to causation is also supported by the testimony of Claimant. He testified that the last time he labored was before the April 30, 1996 injury. (TR 71) He also testified that he did some laboring work on the dock prior to the April 30, 1996 injury, but he had not been in the hold for a while. (Tr 71-72)

In view of the foregoing, I find that the medical evidence supports the conclusion that Claimant's work activities on May 12, 1993 aggravated his degenerative arthritis, and that Claimant's subsequent work activities have not altered the natural progression of the disease. Although no mention of a hip injury is mentioned in the records from St. Raphael's Hospital, it is apparent that the doctors were more concerned with Claimant's right knee complaints. I find the opinions of Dr. Luchini are more persuasive on the issue of causation, and are entitled to greater weight. Dr. Luchini is board certified in orthopedic surgery and has been treating Claimant since 1988. He thoroughly explained how Claimant's injuries on July 12, 1988 and May 12, 1993 made his degenerative hip disease symptomatic. There is no indication in the records from St. Raphael's Hospital that they were aware of Claimant's degenerative hip disease or his July 12, 1988 work-related accident. I note that Dr. Goodman diagnosed degenerative arthritis of the right hip on March 22, 1993. (CX Y) I also find Dr. Luchini's testimony, that Claimant's condition has not changed from that of 1993 through 1998, to be credible given that it is well-reasoned and supported by the testimony of Claimant and Mr. Schine.

Therefore, I find and conclude that Claimant sustained work-related injuries to his right hip and knee on May 12, 1993, that Respondents had timely notice and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d

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[7]Two of the dates occurred in July of 1995, while Respondent Liberty Mutual was still Employer's liability carrier. (RX 16 at 17) Mr. Schine stated that two straight-time hours attributed to Claimant on December 20, 1995 was probably a day the gangs could not work a ship due to inclement weather, and everybody was paid for two hours and no work was performed. (**Id**. at 19-20)

644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has failed to establish that he cannot return to work as a third gang signalman. Claimant testified that after his work-related accident on May 12, 1993, he was out of work, but returned to work after about one week. Claimant has continued his work as a signal man at Employer's maritime facility, missing time from May 6, 1996 to July 2, 1996, and September 4, 1996 to September 28, 1997, due to his April 30, 1996 work-related accident. (TR 44; RX 2) Claimant stated that there is no outstanding claim of temporary total disability against either Respondent, but that the unresolved issue relates to a claim for benefits pursuant to Section 8(c)(21), such benefits to commence on

March 20, 1996. (TR 10-14) I therefore, find and conclude that Claimant is partially disabled on and after March 20, 1996, as shall be discussed below.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period of time and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal hearing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding and Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that Claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipbuilding Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery,

and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978), or that Claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell, supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp., supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 13 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on March 20, 1996, according to the well-reasoned opinion of Dr. Luchini. (EX 3; CX X) Accordingly, I find that the Claimant was permanently and partially disabled from March 20, 1996, through the present and continuing, as shall be discussed below.

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of

wage earning capacity. **Cook, supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980). It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury. Richardson, supra; Cook, supra.**

Claimant argues that, because of his hip injury of May 12, 1993, he has incurred a loss in his wage earning capacity of $150.00 per week. (TR 12-13) He claims that such benefits should commence on March 20, 1996, and continue through the present. (TR 13-14)

However, this closed record conclusively establishes, and I find and conclude, that Claimant has established a post-injury wage earning capacity of $716.89. Although coincidentally used as the average weekly wage for the settled companion claim, I find that this wage accurately reflects Claimant's post-injury wage earning capacity. This average weekly wage was based on Claimant's actual earnings from May 6, 1995 through April 27, 1996. (CX J; RX 8) Such wage data, used to establish Claimant's average weekly wage for the April 20, 1996 work-related injury, also serves to establish Claimant's post-injury wage earning capacity, as Claimant is seeking benefits to commence on March 20, 1996. Thus, I find and conclude that Claimant has a post-injury wage earning capacity of $716.89 per week and that, pursuant to Sections 8(c)(21) and 8 (h), he is entitled to benefits at two-thirds of the difference between his average weekly wage of $817.24 and his post-injury wage earning capacity of $716.89.

While Claimant alleges a loss of wage earning capacity of $150.00, such a figure is not borne out by the wage records before me. While Claimant did submit wage information beginning on January 2, 1993 (CX U), such information is irrelevant as Claimant does not seek benefits until March 20, 1996. This Court views the average weekly wage of $716.89 to be more accurate, as it is supported by the wage data (CX J; RX 8), and as Claimant's counsel stipulated to such a wage with regards to the injury which occurred five weeks after the date in which Claimant seeks benefits.

This Administrative Law Judge notes that the record also contains wage information for the period of October 4, 1997 through May 30, 1998. (CX T) During that thirty-seven week period, Claimant earned $30,758.26, which would result in an average weekly wage of

$831.30. However, I find that such earnings represent changing economic times and the usual inflationary factors since the date of injury, and they are not representative of Claimant's current wage-earning capacity. Claimant, noting the high number of hours he worked in April and May of 1998, commented that 1997 and 1998 had been "very good years for the shipping industry." (TR 59)

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

The employer is responsible for the reasonable, necessary and appropriate medical expenses incurred by claimant after the employer's physician incorrectly diagnosed claimant's injury and released him to work because those actions were tantamount to a refusal to provide further treatment under the Act. **Atlantic & Gulf Stevedores v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **McGuire v. John T. Clark & Son of Maryland**, 14 BRBS 298 (1981). A physician's urging that the employee return to work may constitute a refusal of treatment. **Rivera v. National Metal & Steel Corp.**, 16 BRBS 135 (1984). When a Claimant requests treatment and the employer fails to satisfy that request, the Claimant is entitled to reimbursement, pursuant to Section 7(d) of the Act, if the treatment he subsequently procures on his own initiative was necessary for treatment of the injury. **Anderson v. Todd Shipyards Corp**., 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp**., 20 BRBS 184 (1988); **Rieche v. Tracor Marine, Inc.**, 16 BRBS 272 (1984); **Rivera, supra**; **Rogers v. PAL Services**, 9 BRBS 807 (1978).

The Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work-related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984). In order for a medical expense to be assessed against the Employer, the expense must be both reasonable and necessary. **See, e.g., Romeike, supra**.

Since evidence exists indicating that medical treatment is necessary for a work-related condition, Claimant has established a **prima facie** case for compensable medical treatment. **See, e.g., Romeike, supra; Turner v. Chesapeake & Potomac Telephone Co.**, 16 BRBS 255 (1984).

Accordingly, Respondent Liberty Mutual is liable for the reasonable, appropriate and necessary medical expenses incurred by Claimant because of his May 12, 1993 work-related injuries to his right hip and knee, including payment of any unpaid medical bills relating to the injury before me.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the

Employer has timely controverted the entitlement to benefits by Claimant. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir.**

1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

In cases where a Claimant is partially disabled, the employer must demonstrate that the current permanent, partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." **33 U.S.C. §908(f)**; **Metropolitan Stevedore Co. v. Rambo**, 515 U.S. 291, 293 (1995);

Director, OWCP v. Bath Iron Works Corp. [Johnson], 129 F.3d 45, 51 (1st Cir. 1997); **Director, OWCP v. Ingalls Shipbuilding, Inc.**, 125 F.3d 303 (5th Cir. 1997).

I have previously found the Claimant is permanently and partially disabled. Accordingly, the Employer has the heavier burden of proving that the current permanent, partial disability is materially and substantially greater than it would be based on the May 12, 1993 injury alone.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for Employer since 1967, with a two year break while serving in the United States Army; (2) that Claimant suffered a right knee injury on July 12, 1988 (TR 38-40), resulting in a five (5) percent permanent partial impairment; (3) that Claimant suffered a lower back injury on October 10, 1990 (TR 40-42), resulting in a ten (10) percent permanent partial impairment to the lumbar spine; (4) that he sustained injuries to his right knee and hip on May 12, 1993 while working at Employer's shipyard (TR 43-44; EX 2); (5) that Dr. Luchini stated that Claimant's condition was made materially and substantially greater because of the pre-existing condition to his right knee as well as right hip (EX 2); (6) that Dr. Luchini found Claimant had degenerative arthritis in the right hip that was made symptomatic originally by the injury of July 12, 1988 and then the subsequent injury of May 12, 1993 (JX 1); and (7) that Claimant has a ten (10) percent permanent partial impairment to the right hip (JX 1). **See Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury herein on May 12, 1993 was the classic condition of a high-risk employee who a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C&P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuildong and Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer and it Carrier Liberty Mutual Insurance Company ("Respondent's" herein). Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to Respondents counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after March 18, 1997, the date of the informal conference. Services performed prior to that date should be submitted to the District Director for her consideration.

ORDER

Based on the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. Commencing on March 20, 1996, and continuing thereafter for 104 weeks, Respondent Liberty Mutual shall pay to the Claimant compensation benefits for his permanent partial disability, based upon the difference between his average weekly wage at the time of injury, $817.24, and his wage-earning capacity after the injury, $716.89, as provided by Section 8(c)(21) and 8(h) of the Act.

2. After cessation of payments by Respondent Liberty Mutual, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. Respondent Liberty Mutual shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his May 12, 1993, work-related injury on and after March 20, 1996.

4. Respondent Liberty Mutual shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries referenced herein may require, even after expiration of the time period specified in provision one, subject to the provisions of Section 7 of the Act.

5. Interest shall be paid by Respondent Liberty Mutual on all accrued benefits at the T-bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondents counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on March 18, 1997.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jgg